No. 84-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NANCY FREEDMAN, et al.,

Petitioners,

vs

TRANS WORLD AIRLINES, INC., and
AIR LINE STEWARDS & STEWARDESSES
ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Respondents.

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. OPPOSING REVIEW

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Petitioners seek review of a decision of the United States Court of Appeals for the Seventh Circuit that denied modifications of a 1979 settlement agreement and court order in a class action against TWA. The action. begun in 1970. had alleged that an airline practice of terminating flight attendants on pregnancy violated Title VII of the 1964 Civil Rights Act.[1]

[1] Similar class actions were filed on the same day against American Airlines. Inc. and TWA. Both abandoned the practice in 1970. The litigation continued over the alleged violation of Title VII and remedies of back pay. reinstatement. seniority. etc. The litigation has produced eight court of appeals decisions. several denials of certiorari. and one reported decision of this Court. See *ALSSA* v. *TWA*. 630 F. 2d 1164 (1980). and *Zipes*. cited in the text. and cases there cited.

The settlement was intended to be complete, with the stated purpose of "putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised."[2] In February 1982 *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, affirmed lower court decisions approving the settlement and awarding reemployed class members competitive seniority up to the date of the agreement, as it provided.

Later in 1982 the petitioners filed motions to extend the competitive seniority period from the date of the agreement to the dates of re-employment of all class members in 1983 and to require re-employment of 14 class members who in 1979 had rejected re-employment under the settlement.[2a] The district court's denial of the motions was affirmed by the court of appeals in March 1984 in the decision sought to be reviewed. *Freedman* v. *Trans World Airlines, Inc.*, 730 F. 2d 509 (Pet. App. 1a).

The petition for certiorari should be denied because, since it is based on factual assertions not supported by the record and on inapplicable legal principles, the claimed conflict with other decisions does not exist.

I

DENIAL OF ADDITIONAL SENIORITY NOT IN CONFLICT WITH OTHER DECISIONS

Petitioners demand modification of the seniority award to give them approximately four more years of competitive seniority in addition to the period, amounting variously from 9 to 14 years, awarded reemployed class members under the settlement

[2] TWA App. 1a.

[2a] TWA App. 18a and 21a.

contract.[3] The court of appeals denied the modification because the delay in reemployment, caused by the settlement approval proceeding, was foreseeable from the provisions of the contract. Petitioners do not dispute this factual holding. Their main argument (pp. 8-10) is that the decision in *Firefighters Local Union No. 1784* v. *Stotts*, ____ U. S. ____, 81 L. Ed. 2d 483 (1984), requires "Title VII standards" to be applied in measuring the district court's power to modify the award of seniority; and that Title VII under *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), required them to be given full retroactive seniority to the dates of reemployment. They also assert that the court of appeals did not apply the standards for modification enunciated in *System Federation* v. *Wright*, 364 U. S. 642 (1980), and other decisions (Pet.9 n.8).

A. Award of Additional Seniority Would be an Extreme Violation of the Settlement Agreement

The four corners of the settlement agreement expressly and clearly negative the claimed modification for awarding additional seniority. The *Stotts* opinions of Justices White and Stevens[4] referred to the "four corners" of a consent decree in determining its application rather than what might have been provided after disputed litigation.

The overall design of the contract relieved TWA of any obligation not expressly stated. In Section III.[5] TWA agreed (A) to pay class members $3 million; (B) to re-employ eligible class members or give them trip passes; and (C) to credit those re-employed with seniority as provided in Section V. Clause D stated that TWA has "no . . . other obligation to any member of the class . . . unless expressly provided in this Agreement."

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[3] The seniority granted under the agreement was for the period from termination during 1965-1970 to the date of execution of the contract, June 18, 1979. See below, p. 4.

[4] Justice White, 81 L. Ed. 2d 496; Justice Stevens, 81 L. Ed. 2d 507.

[5] TWA App. 2a-3a.

The provision for retroactive seniority in Section V was expressly limited by the defined term "compensation period." The definition said that it meant the period which commenced on termination and ended when TWA signed the agreement (June 18, 1979).[6] The compensation period among other things limited the amount of competitive seniority to be determined by the district court under Section V-B, as amended.[7] The district court's award of competitive seniority necessarily followed the agreement by stating that each reemployed class member should be credited with her seniority when terminated "plus credit for such seniority *for the 'compensation period'* as defined in the Settlement Agreement."[8]

Thus, in seeking to modify the seniority award, petitioners are also necessarily seeking to modify the settlement agreement and the order approving the agreement which limited TWA's obligations to those expressly stated. Since the additional years of competitive seniority were not "expressly provided," petitioners' claim is a serious violation of the settlement bargain they made in 1979. Their claim is unfair to TWA and to the district court, the court of appeals, and this Court, which they persuaded to approve the settlement during 1979 to 1982.

B. No Grounds for Modification

1. Decisions Cited by Petitioners Do Not Support Modification

Neither the settlement agreement nor the seniority award provided for the modification of either. The settlement agreement stated that it would be enforceable in the district court "by virtue of the powers of said Court to enforce its orders and judgments, in addition to any other rights and remedies which

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[6] TWA App. 1a, 9a.
[7] TWA App. 10a.
[8] TWA App. 13a.

plaintiffs may have."[9] The order awarding seniority stated that the court retained jurisdiction to enforce the agreement and the order and to adjudicate any disputes concerning its interpretation.[10]

The source of authority to modify as sought by the petitioners must thus be in common law or equity principles as implemented in Rule 60(b) of the Federal Rules of Civil Procedure. This Court in *System Federation* v. *Wright*, 364 U. S. 642, 644 (1961), noted that the motion to modify a consent decree was made under Rule 60(b).

Petitioners in the court of appeals and here treat what they seek to change as a "consent decree." Never before in this litigation was that term used in any of the courts, including this Court in *Zipes* v. *TWA*, which affirmed the settlement approval and the seniority award. The court of appeals in the opinion sought to be reviewed accepted petitioners' "consent decree" nomenclature on the ground that the standards for modification of a settlement contract and a consent decree are essentially the same (Pet. App. 8a, n. 8).[11] That idea can be accepted in opposing reviewability because the petitioners, as the court of appeals held, are unable to meet the limited consent decree standards for modification as stated in many decisions of this Court since *United States* v. *Swift & Co.*, 286 U. S. 106, 119 (1932).

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[9] TWA App. 9a.

[10] TWA App. 13a.

[11] However, there are significant differences. Parties customarily enter into settlement agreements without court approval or knowledge, for court approval is required only in class actions by reason of Rule 23(e). Modification of such a contract is accordingly determined by contract principles of reformation and restitution. *Restatement of the Law, Contracts 2d, chs. 6 and 7, § 151-167.* In contrast, the source of the power to modify a consent decree, which usually contains an injunction, is "the fact that an injunction often requires a continuing" supervision by the issuing court. *System Federation* v. *Wright*, 364 U. S. 642, 674 (1961), quoted in Justice Blackmun's dissent in *Stotts*, 81 L. Ed.2d 519.

The petitioners' claimed factual basis for modification is that the judicial process for approval of the settlement contract and seniority award postponed their re-employment and deprived them of four years of seniority between the time fixed by the agreement for the end of the retroactive seniority period (June 18, 1979) and their re-employment sometime in 1983. The court of appeals held that this delay was foreseeable from the settlement contract so that the petitioners did not make a "showing of grievous wrong evoked by new and unforeseen conditions" under *Swift* and other decisions (Pet. App. 9a-9b).

The court of appeals rightly held that the delay asserted by the petitioners must have been foreseen by them. The settlement contract expressly provided in detail for the eventuality of an appeal from the order approving the settlement. The carrying out of the settlement depended on the "final order date," defined in the agreement as the date when its approval is "no longer subject to review."[12] The litigation over approval of a *1971* settlement agreement had held up the proceeding until this Court denied certiorari in *1974* on a court of appeals' disapproval of the settlement. *ALSSA* v. *American Airlines*, 490 F. 2d 636, cert. den. 416 U. S. 993. Petitioners, at least through their counsel, were fully aware of the probability of several years of delay in re-employment and the seniority period as a result of the provisions in the settlement agreement for its final approval on appeal.[13]

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[12] TWA App. 1a.

[13] Other cases cited by petitioners (p. 9 n 8) on the authority to modify a consent decree do not conflict with the orders sought to be reviewed and are of no relevance. In *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 443 (1976), an ambiguous injunction not in a consent decree or settlement affected the future operation of public schools. In *New York State Assoc. for Retarded Children* v. *Carey*, 706 F. 2d 956, 968-71 (2d Cir. 1983), where an injunction had limited the facilities for patients in a state institution, the court indicated that a less rigid standard for modification applied when an injunction involves "the supervision of changing conduct or

(Footnote continued on following page.)

2. Title VII does not Require the Claimed Modification

Petitioners' major contention apparently is that Title VII, regardless of any other principles, entitles them to the modification that would add four additional years of seniority. They argue that a summary judgment that TWA's pregnancy practice violated Title VII supports their contention under such Title VII decisions as *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 777 (1976), *Firefighters* v. *Stotts*, ____ U.S. ____, 81 L. Ed. 2d 483 (1984), and *Romasanta* v. *United Air Lines*, 717 F. 2d 1140, 1156 (7th Cir. 1983). The decisions do not uphold petitioners' contention.

Franks involved, not a settlement, but a contested seniority award which this Court considered on direct appeal from the award. Here the limitation of seniority to the compensation period was a negotiated bargain. The petitioners could have made their claim for additional years of seniority as an objection to the settlement agreement and the seniority award in 1979. Instead they urged approval of the agreement which limited competitive seniority and the district court's authority to award it to the defined compensation period.

Further, after the settlement, the summary judgment of TWA's violation of Title VII became of no significance between TWA and the petitioners. The settlement agreement provided that the action against TWA would be dismissed by the order approving the settlement.[14] Accordingly, the action was dismissed in the order approving the settlement[15] as well as in the

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(Footnote continued from preceding page.)

conditions" (p. 967). In affirming the dissolution of a consent injunction that was based on a single isolated securities act violation years before, the court in *SEC* v. *Warren*, 583 F. 2d 115, 118-20 (3d Cir. 1978) emphasized that the district court would be reversed only on a finding of abuse of discretion.

[14] Sec. X. TWA App. 8a.

[15] TWA App. 11a.

order awarding seniority.[16] The summary judgment was practically voided by the dismissal of the action that had brought about the summary judgment. The remand order of the court of appeals explained that the summary judgment "has no apparent continuing significance independent of the settlement."[17]

The petition overlooks this Court's approval of the settlement in the *Zipes* decision in saying (p. 8) that it "reinstated the district court's decision granting summary judgment to the plaintiff class." The *Zipes* opinion was discussing the union's attack on the seniority award when it said that, with the reversal of the court of appeals' decision in 582 F. 2d 1142 and the dismissal of TWA's certiorari petition to review that decision, the summary judgment order "remains intact and is final."[17a] The finding of a violation was thus held sufficient to award retroactive seniority for the compensation period over the union's objection under *Teamsters* v. *United States*, 431 U. S. 324 (1977). But between TWA and the petitioners, the summary judgment became *functus officio* with the dismissal of the action.

Petitioners overlook significant differences between *Firefighters* v. *Stotts* and this case. The consent decree there did not award competitive seniority and had no provisions for layoffs, as emphasized in the opinion (81 L. Ed. 491, 496). When proposed layoffs because of economic conditions would have bumped black employees of lower seniority, the district court enjoined the layoffs under general provisions of the decree. The controversy in the lower courts and the different views in this Court were produced by the absence of express decree

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[16] TWA App. 13a.

[17] TWA App. 17a.

[17a] 455 U. S. 399: "... the order that found classwide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice."

provisions and dealt with whether the injunction was justified as an enforcement of the decree, or as a modification of it, or as an application of Title VII.

Here there is no such room for dispute because the settlement agreement and the seniority order expressly and clearly limit seniority to the date of the agreement. Further, the majority holding in *Stotts* was that § 706(g) of Title VII limited the district court's authority to administer the decree and required denial of the seniority claim. Here the petitioners contend that Title VII as applied in *Franks* requires a change in a basic feature of the settlement agreement to award them more years of seniority.

Petitioners evade the real significance of *Romasanta* v. *United Air Lines* when (pp. 9-10) they cite it for a statement that Title VII requires the maximum measure of seniority relief that would not result in unusual adverse impact. *Romasanta* involved a no-marriage rule for flight attendants that had been held to violate Title VII. The district court restored competitive seniority only for the period of actual employment and did not, as in the agreement here, permit seniority for the period from termination to the date of settlement. The court of appeals held that the district judge did not abuse his discretion in holding that the *Franks* principle of "full retroactive seniority" did not require an award of full seniority for the termination period. The Supreme Court denied certiorari in April 1984 (44 CCH S. Ct. Bull. B2083), which the petition does not mention although petitioners' counsel here represented flight attendants there (717 F. 2d at 1142).

The *Romasanta* decision refutes petitioners' contention that, to comply with Title VII standards, the settlement agreement must be modified to give them competitive seniority for the four years before their re-employment in addition to the many preceding years of their termination. *Romasanta* held that even a contested, non-settled denial of all years of retroactive competitive seniority did not violate the *Franks* principle of full seniority under Title VII.

II

DENIAL OF RE-EMPLOYMENT NOT IN CONFLICT WITH DUE PROCESS AND RULE 23 DECISIONS

Fourteen petitioners attack in this Court for the first time the adequacy of a settlement notice and claim form under the Due Process Clause and Rule 23 of the Federal Rules of Civil Procedure. In 1979 they said, in returning the form, that they did not desire re-employment. In October 1982 they moved in the district court for an order directing TWA to re-employ them despite their earlier choice of 12 trip passes in lieu of re-employment.[18] They contended that the settlement agreement and claim form did not make their 1979 choice irrevocable and that equitable principles justified their re-employment. The district court (App. 25a) and the court of appeals (*Id.* 13a-14a) construed the settlement agreement as foreclosing these petitioners' change of mind.

Petitioners in this Court do not continue their contention about the construction of the settlement contract, but contend, as they did not below, that the notice of the settlement and the claim form failed to give them necessary information in violation of due process and the notice requirements of Rule 23. They now allege a violation of the "standards of *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950)" and attack, again for the first time, the "timing" of the claim form.[19]

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[18] TWA App. 6a.

[19] The newness of petitioners' attack on the claim form is indicated by its presence in the record, not as an exhibit, but only as a partial description in the petitioners' motion in the district court: "A 'Claim Form for Settlement Benefits' was completed by most class members in the summer of 1979. . . . One of the questions asked on the claim form is 'Do you desire re-employment as a TWA hostess'? Next to the question are boxes labeled 'Yes' and 'No'. The class members affected by this motion checked the 'No' box." (TWA App. 21a).

Ordinarily this Court does not give consideration to issues not raised below. *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1940). *Michel* v. *Louisiana*, 350 U. S. 91, 99-101 (1955). *Steagald* v. *United States*, 451 U. S. 204, 208 (1981). Here the petitioners have twice failed to raise the issues they now ask this Court to consider. (1) Those issues were not raised when they sought reemployment in this proceeding as noted. (2) The notice they attack on new grounds in this Court was expressly held adequate by the order[20] approving the settlement in November 1979, which the petitioners then sought and which the court of appeals and this Court affirmed in *Zipes*, 455 U. S. at p. 401. And petitioners' contentions lack merit for further reasons.

A. Notice and Claim Form Not Inadequate

1. Petitioners Not Misinformed

Petitioners seriously misread the record when they say (p. 12) that the notice to class members failed to state that those "who did not opt for reinstatement would irrevocably waive such relief" and was "completely silent about the significance of the question" of whether they desired reemployment. In fact, both the agreement and the notice explained expressly and clearly that class members would be re-employed only if they so indicated in the claim form in 1979.

Section VI of the agreement[21] stated that a class member was eligible for re-employment if she fulfills physical requirements, etc., "and timely files the following described Re-employment Application." The section then said that each class member desiring re-employment "shall in writing so indicate" by providing prescribed information in the application. It then

[20] "The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of the plaintiff class and Subclasses A and B." TWA App. 11a.

[21] TWA App. 4a-5a.

said that the application form was to be prepared and distributed by plaintiffs' attorneys to whom each class member "desiring re-employment" shall forward the form. Compliance with the time limit as a condition of re-employment was stated in unequivocal language: "*No class member shall be entitled to re-employment . . .* unless she completes and returns the aforesaid form . . . within sixty (60) days." (Emphasis added)

The notice to class members was equally clear and emphatic in informing them that, if they wished to be re-employed, they must make known their choice within a set period in 1979. The notice stated that "to be eligible for re-employment" the class member must meet certain requirements, of which the first was "Complete the enclosed Claim Form" (Pet. App. 35a). The conclusion of the notice (*Id.* 38a) said in capital letters, "TO RECEIVE ANY OF THE BENEFITS OF THE SETTLEMENT . . . YOU MUST RETURN THE ENCLOSED CLAIM FORM." and in a final sentence, "The claim forms must be received by Pressman & Hartunian, Chtd. by no later than August 31, 1979" (*Id.*). The form required the class member to indicate whether she desired employment by marking a "Yes" or "No" box.[22]

There is thus no factual basis for the petitioners' contention that the notice and claim form did not adequately inform them under the due process clause and Rule 23 that they had to choose re-employment in 1979 in order to obtain it under the settlement.

2. No Conflicting Decisions as Claimed by Petitioners

Since there is no factual basis for petitioners' contention that the notice was inadequate, the decisions on inadequate notice claimed by petitioners (pp. 11-12) to conflict with the rulings below are all inapplicable. Those decisions also involved issues significantly different from those here.

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[22] TWA App. 21a.

The class action, due process decision of *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950), which dealt with the method of giving notice, held inadequate the first notice by newspaper publication of a state court proceeding to common trust fund beneficiaries whose rights would be bindingly adjudicated. Notice by mail was held required for beneficiaries whose addresses were known. Here the notice class members received of a prior settlement in 1971 was held adequate in *ALSSA* v. *American Airlines*, 455 F. 2d 101, 108 (7th Cir. 1972). The petitioners here had been members of the class for years and represented by counsel. The 1979 notice of settlement, given by mail, was held adequate in the settlement approval order, as noted above.[23]

Some of the decisions cited by petitioners involved notices under Rule 23(d)(2) rather than the Rule 23(e) notice given here. Rule 23(d)(2) deals with the notices of various matters, i.e., "of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action" (Pet. App. 3). The notice of the settlement was required by Rule 23(e), stating that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs" (*Id.*). *Kyriazi* v. *Western Elec. Co.*, 647 F. 2d 388, 396 (3rd Cir. 1981), which is cited by petitioners (Pet. 11), involved a notice under Rule 23(d)(2) and differentiated one aspect of *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1157 (6th Cir. 1978), on the ground that it dealt with a settlement notice under Rule 23(e).

3. Petitioners' Attorneys And Not TWA Would Be Responsible for the Claimed Inadequacy

The notice and claim form which petitioners attack in this Court were prepared by their own attorneys, who had been

[23] TWA App. 11a.

appointed to represent the class members and had represented them for years.[24]

The settlement agreement expressly put the notice and claim forms under the control of their attorneys. Section X stated, "plaintiffs' attorneys will draft all orders, notices and other papers necessary . . . for the implementation of the procedures required under Rule 23, F.R.C.P., *including a proposed form of notice to class members.*"[25] Section VI provided that the re-employment application form should be "prepared and distributed by plaintiffs' attorneys," to whom the form was to be forwarded.[26] These provisions were followed by the statement quoted above that no class member "shall be entitled to re-employment" unless she returned the form to the class members' attorneys within the fixed period.

In attacking the notice and claim form provisions about re-employment, the petitioners are attacking the legal services of their own attorneys. TWA is not responsible for the inadequacy, if any, in the performance of those services.

B. "Timing" of Claim Form Not Invalid

Petitioners contest another feature of the re-employment procedure which they do not explain other than to say, "The timing of Rule 23(d)(2) claim forms is a second issue presented by this case" (Pet. 12). The two cases they mention do not support any objection about the time of the employment procedure.

A settlement in *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1157 (5th Cir. 1978), required class members to accept it before its approval or be deemed to have opted out of the class. On appeal by dissatisfied class members, it was held that the imposed option "unfairly burdened" the right to appeal from the approval of the settlement. Here the requirement for

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[24] Pet App. 34a-35a

[25] TWA App. 8a; emphasis added

[26] TWA App. 5a.

filing the claim form stating whether employment was desired did not prevent a class member from objecting to the settlement on that or any other ground and did not, as the form in *Pettway*, exclude the person from the class action. On the contrary, petitioners are making an objection they could have made in 1979 in the approval proceedings.

The clause petitioners quote from the opinion in *Romasanta* v. *United Air Lines*, 717 F. 2d 1140, 1147 (7th Cir. 1983), cert. den. 44 CCH S. Ct. Bull. B2083, is not applicable. There one of several interlocutory appeals objected to the district court's refusal to subdivide the class of approximately 1400 class members into those who wanted to return to work and those who sought only a financial remedy. The court of appeals agreed with the district court, commenting that (as quoted by petitioners) it would be "impossible to determine at this point" which class members wanted employment. This does not mean that the settlement here, in requiring class members to choose re-employment in 1979, imposed a procedure that was not permitted by Rule 23. If it did, the objection should have been made then to the approval of the settlement.

III.

PETITION CONTRARY TO POLICY FAVORING SETTLEMENTS

Petitioners are asking this Court to open up the 1979 settlement agreement that was intended to provide a complete termination of the litigation, putting to rest all claims that had or might have been raised. The changes demanded could have been sought during the settlement approval proceedings in 1979 to 1982. The notice informed them of where and how to object to the settlement (Pet. App. 38a). Now they are trying to avoid clear settlement provisions that they find disadvantageous after they have obtained the benefits of the bargain that all federal courts approved.

The remedies demanded in the lower courts and the certiorari petition are contrary to the policy favoring settlements. That policy is particularly strong here because Congress intended to encourage the settlement of Title VII litigation. *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n 14 (1981). The policy is not needed to support the sound reasons for the decision sought to be reviewed. But review would tend to weaken the policy by prolonging the litigation that the settlement was intended to terminate.

CONCLUSION

Respondent TWA urges the denial of the certiorari petition.

Respectfully submitted.

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APPENDIX

APPENDIX

Rec. No. 191

EXCERPTS FROM SETTLEMENT AGREEMENT

[Filed June 27, 1979]

I. DEFINITIONS

* * *

"Compensation Period" shall mean the period of time which commenced upon the termination of a class member's employment and ends on the date on which this Settlement Agreement is signed by TWA but it does not include any period after the beginning of re-employment for which TWA offered or granted reinstatement as a hostess with full pay, seniority and credit for length of service retroactive to the time when she was ready, willing and able to resume working as a hostess.

"Final Order Date" shall mean the date on which the order described in Section X becomes final and no longer subject to court review.

II. This Agreement is entered into between Trans World Airlines, Inc. (hereinafter referred to as "TWA") and the undersigned representatives of the class for the purpose of compromising, settling and terminating all litigation of the lawsuits (including, but not limited to, the petitions for writs of certiorari now pending in the U.S. Supreme Court, docket numbers 78-1545 and 78-1549) and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings.

The parties agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it

whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

III. SETTLEMENT BENEFITS TO BE OBTAINED BY CLASS MEMBERS

In consideration of the execution of the Release described herein and in consideration of the dismissal of these lawsuits against TWA in all respects (except, possibly, as to the matters referred to in Section V.B), TWA hereby covenants and agrees to do the things and perform the acts described herein, at the times and in the manners set forth in this Agreement, all of which shall be subject to the conditions set forth herein.

A. TWA will pay to the Class the aggregate amount of Three Million dollars ($3,000,000), as follows:

1. TWA will pay to Class Group A the sum of One Million Five Hundred Thousand Dollars ($1,500,000);

2. TWA will pay to Class Group B the sum of One Million Five Hundred Thousand Dollars ($1,500,000).

After deduction therefrom of all amounts awarded by the Court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be pro-rated among the class members as provided in Section IV hereof. TWA has no responsibility concerning the calculations or allocations of the total amount among the class members or for fees, costs and expenses.

B. TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment. Any class member who is not either ready, willing or qualified (as defined in Sections VI and IX) for re-employment shall receive from TWA the trip passes described in Section VII.

C. All re-employed class members shall have, be credited with and enjoy the amount of seniority and credit for length of service as is provided in Section V hereof.

D. TWA will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

* * *

V. SENIORITY AND CREDIT FOR LENGTH OF SERVICE

A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. For each pregnancy which terminated in the birth of a child, the period of disability shall be deemed to be nine (9) months. In the event pregnancy was terminated other than by the birth of a child, the period of disability shall be deemed to be the number of weeks of the pregnancy.

B. TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. However, in the

event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled at the time her employment was terminated. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

VI. ELIGIBILITY FOR RE-EMPLOYMENT

TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period. TWA will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member as such. A class member shall be eligible for re-employment if she fulfills

TWA's physical requirements (reasonably applied), medical examination, completion of retraining, and timely files the following described Re-Employment Application; provided, however, that no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 and who has been terminated for cause or who has resigned under circumstances which reasonably do not entitle her to be re-employed.

Each class member who desires re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:

A. Current full name, name as of termination, social security number, and former TWA employee number

B. Home address and mailing address, including zip code

C. The last TWA base at which she was employed.

D. Approximate date on which she was last employed by TWA

E. Preferences concerning location of new home base

F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability.

G. Financial information necessary for the calculation described in Section IV

Each class member desiring re-employment shall forward the said form to the attorneys for the plaintiffs, who shall then keep one copy for retention in their files and forward one copy to TWA. No class member shall be entitled to re-employment under this Agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencement of the hearing described in Section X; provided, however that in case of any person who is (a) named in the list of class members attached

hereto but who does not receive notification of her rights because of an incorrect mailing address or (b) not named in the aforesaid list but who demonstrates diligence and entitlement to class membership, the deadline for filing the aforesaid form shall be 30 days prior to the commencement of TWA's last retraining class.

Within thirty (30) days after entry by the Court of an order (if any) determining the matters described in Section V.B., or within thirty (30) days after expiration of the deadline for filing the Re-Employment Application, whichever is later, TWA shall prepare a special list showing the adjusted seniority date of each class member who had applied for re-employment, one copy of which shall be supplied to the attorneys for the class representatives. Each class member's Re-Employment Application shall be acknowledged in writing by TWA by certified mail, addressed to the class member, advising her of her adjusted seniority date.

VII. TRIP PASSES FOR NON-RETURNING CLASS MEMBERS

Each class member who does not become re-employed shall be entitled to receive twelve (12) trip passes for use at any time or times during her lifetime. Each trip pass shall be good for travel on TWA for herself, her spouse or her child (provided that the child is (a) a dependent for IRS purposes and (b) is either under 21 or is a full time student under 23) from origin, point to destination and return to point of origin with enroute stopover privileges. The trip passes will be of the same priority class as trip passes for retired TWA hostesses (Class 9); provided, however, that such retired hostesses and other retired persons utilizing Class 9 passes shall have higher boarding priority.

* * *

IX. RE-EMPLOYMENT PROCEDURES

For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend. If the applicant fails within fifteen (15) days after the date of the notice either to accept the offer or provide a reasonable excuse for not accepting, she will forfeit her right to re-employment under this Agreement. Failure to accept any subsequent offer shall forfeit her right to re-employment unless it is due to temporary physical disability or other personal hardship; provided, however, any applicant who is excused from attending a retraining class because of personal hardship shall not accrue seniority for any purpose during the period beginning with the first day of the retraining class from which she was excused and ending on the first day of the retraining class which the applicant eventually successfully completes. Any class member who fails to meet the criteria described herein shall be ineligible to attend that class and she shall have sixty (60) days thereafter within which to meet the criteria. If she is deemed to have failed the medical examination, she may object to the determination made by the company doctor and obtain review thereof by petition to this Court, filed within sixty (60) days after receipt by her of TWA's written advice thereof.

* * *

X. SETTLEMENT PROCEDURES

This Settlement Agreement shall be submitted to the Court for its preliminary approval. If the Court grants preliminary approval and deems it a fit and proper Agreement for submission to the processes described in Rule 23(e), F.R.C.P., plaintiffs' attorneys will draft all orders, notices and other

papers necessary for compliance with the orders and directions of the Court and for the implementation of the procedures required under Rule 23, F.R.C.P., including a proposed form of notice to class members. All such papers shall be submitted to the attorneys for TWA at a reasonable time prior to submission to the Court, in the normal manner applicable to the presentation of any motion or application to the Court. The parties shall jointly file in the United States Supreme Court a motion and stipulation asking that the current pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date.

Plaintiffs shall prepare an alphabetical list of all class member's names. One copy of the notice shall be sent by first-class U.S. mail to each class member.

The costs of notifying the class, including the preparation and reproduction of notice forms, class lists, purchase of envelopes, postage, handling and mailing, shall be borne by plaintiffs, to be recovered only if and when the Court authorizes reimbursement out of the settlement funds.

After notice has been distributed to class members and after hearing has been held pursuant thereto, plaintiffs and TWA will apply to the Court for an order which approves this Settlement Agreement and dismisses these cases against TWA. Plaintiffs will seek an order which is final and appealable under Rule 54(b), F.R.C.P.

If the Court enters an order in accordance with the foregoing, the Final Order Date, as that term is used in this Agreement, shall be:

A. If no valid notice of appeal is filed within the time prescribed in Rule 4(a), Federal Rules of Appellate Procedure, the date on which the time for filing the notice of appeal expires thereunder.

B. If a valid notice of appeal is filed, the date on which such appeal is dismissed or, if the appeal is not dismissed, the date on which an order is entered which affirms the District Court's approval of the settlement plus the expiration of time or the occurrence of judicial events which render such order no longer subject to review or modification.

If the District Court enters an order disapproving of this Settlement Agreement and said order is not thereafter reversed or modified so that approval is otherwise obtained, this Agreement shall be null and void and shall have no force or effect.

* * *

XIV. ENFORCEMENT OF THIS AGREEMENT

The Order of the District Court approving this settlement shall incorporate and adopt by reference the terms of this Agreement. This Agreement shall be enforceable in the United States District Court for the Northern District of Illinois by virtue of the powers of said Court to enforce its orders and judgments, in addition to any and all other rights and remedies which plaintiffs may have under the common law and statutes of the United States.

Dated this 18th day of June, 1979.

TRANS WORLD AIRLINES, INC.

By: /s/ David J. Crombie

Rec. No. 213

AMENDMENT TO SETTLEMENT AGREEMENT

[Filed August 23, 1979]

The Settlement Agreement which has been heretofore entered into between Trans World Airlines, Inc., and the undersigned representatives of the class is hereby amended as follows:

Section V.B shall provide as follows:

It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

Dated this 22 day of August, 1979.

/s/ ANNE B. ZIPES
Anne B. Zipes,
Individually and on behalf
of the Plaintiff Class

Dated this 17th day of August, 1979.

/s/ PAT SANTINI
Pat Santini,
Individually and on behalf of the
Plaintiff Class

Rec. No. 234

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of the plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended.

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order.

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

Dates November 8, 1979

Rec. No. 233

ORDER AWARDING SENIORITY

(Entered November 8, 1979)

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order.

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of and eligibility of class members, and

* * * *

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ STANLEY J. ROSZKOWSKI
Stanley J. Roszkowski. Judge
United States District Court

Dated November 8. 1979

Stamp: UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 1, 1982

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Thomas E. Fairchild, Senior Circuit Judge
Hon. Richard A. Posner, Circuit Judge

In Re:

CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES

No. 77-1325 *vs.*

Appeal of:

AMERICAN AIRLINES, INC. and TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 70-C-2069
70-C-2071
72-C-498
74-C-2063
and 74-C-2762

Frank J. McGarr, Judge.

ORDER ON REMAND FROM THE SUPREME COURT

On August 24, 1978, we decided an interlocutory appeal (No. 77-1325) from orders of the district court in this action. *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). We affirmed the district court order of October 18, 1976, granting summary judgment to plaintiffs on liability. We vacated the order of October 15, 1976 denying a defense motion to exclude a number of class members. We did so based upon our holding that the district court had no jurisdiction of the claims of a particular subclass.

Defendant TWA applied for *certiorari* to review our decision adverse to it, and plaintiffs sought review of our decision adverse to them.

While the applications for *certiorari* were pending, plaintiffs and defendants settled and the district court approved the settlement, made an award of seniority, and dismissed the action. An intervenor who objected to the settlement appealed. No. 79-2460, No. 79-2465. On June 13, 1980, we affirmed holding that there could be a proper settlement involving the claims as to which we had held there was no jurisdiction because that issue had not been resolved with finality. *Air Line Stewards and Stewardesses Assn. v. Trans World Airlines*, 630 F.2d 1164 (7th Cir. 1980).

On March 9, 1981, the Supreme Court granted *certiorari*, in No. 78-1545, to review our vacation of the order of October 15, 1976; in No. 78-1549, to review our affirmance of the order of October 18, 1976, and other portions of our judgment to which TWA objected; and in No. 80-951, to review our affirmance of the judgment approving the settlement awarding seniority, and dismissing the action. 49 U.S.L.W. 3663.

On February 24, 1982, the Supreme Court decided *Zipes v. TWA*, ____ U.S. ____, 50 U.S.L.W. 4238. In view of the Court's decision decision in the other matters, the Court dismissed the petition of TWA in Supreme Court No. 78-1549, slip op. p. 6, fn. 5. In accordance with the opinion, the Court affirmed the judgment of this court in Supreme Court No. 80-951 (our Nos. 79-2460 and 79-2465). In Supreme Court No. 78-1545 the judgment of this court (our No. 77-1325) was "reversed with costs, and the cause is remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court."

TWA and plaintiffs have filed statements of position pursuant to our Circuit Rule 19. TWA states that "the proper order of this Court is to vacate its judgment of August 24, 1978 in No. 77-1325." Plaintiffs assert that our affirmance of the judgment in favor of plaintiff on liability "should remain

intact," our judgment, insofar as it dealt with the jurisdictional issue should be vacated, and there should be a remand for futher proceedings.

We conclude:

(1) Now that the Supreme Court has affirmed our judgment affirming the district court's approval of the settlement, award of seniority, and dismissal of the action, our mandate in Nos. 79-2460 and 79-2465 will issue as of course, and any appropriate proceedings in the district court in implementation and enforcement of the settlement will follow by reason of such affirmance.

(2) Insofar as our judgment of August 24, 1978 adjudged "that the district court properly granted summary judgment in favor of the plaintiffs," it has not been reviewed by the Supreme Court, and it should stand, although it has no apparent continuing significance independent of the settlement entered into by the parties and approved by the district court.

(3) Insofar as our judgment of August 24, 1978 adjudged that "the order of October 15, 1976 is VACATED and REMANDED, in accordance with the opinion of this court filed this date," our judgment has been reversed by the Supreme Court and is hereby modified so as to affirm the order of October 15, 1976. In a sense, such affirmance also lacks continuing significance independent of the settlement, but it retains a degree of significance because, as the Supreme Court concluded, it was the Court's reasoning in reversal on this point on which the Court relied in affirming our judgment of June 13, 1980, without deciding whether the particular reasoning which led us to affirm was correct. Slip op. p. 7, fn. 8. *See also* slip op. p. 13.

Our judgment in No. 77-1325 will be modified as herein above provided, and also to award petitioners Zipes, et al. recovery from TWA of $300.00 costs as provided in the judgment of the Supreme Court. The parties shall bear their own costs in this court.

SO ORDERED.

MOTION FOR MODIFICATION OF ORDER AWARDING SENIORITY

[Filed September 8, 1982]

The plaintiff class, by its attorneys, moves this Court for modification of its Order Awarding Seniority, entered November 8, 1979, to provide for the crediting to each class member of an additional amount of union (competitive) seniority for the period subsequent to the Order Awarding Seniority and up to the date on which each class member is rehired by defendant Trans World Airlines, Inc. ("TWA").

The following is set forth in support of this motion:

1. On November 8, 1979, this Court awarded retroactive union seniority to each class member who was then employed by TWA as a flight attendant or who thereafter became rehired by TWA under the Settlement Agreement. The seniority awarded by this Court included credit for competitive seniority up to June 18, 1979.

2. The Court's stated purpose was to accord "full retroactive seniority" to the class members. That is, the purpose of this Court's Order Awarding Seniority was to restore the class members to the seniority positions which they would have held, vis-a-vis other flight attendants, had they not been illegally fired. The granting of full retroactive seniority was consistent with the "make whole" objective of Title VII and the presumption in favor of full retroactive competitive seniority mandated by *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-766 (1976). In *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 418 (1975), the Supreme Court held that one of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination". In *Franks*, the Supreme Court stated:

> "To effectuate this "make whole" objective, Congress in § 706(g) vested broad equitable discretion in the federal

courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate."

* * *

"The provisions of [§ 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole, and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 763-764.

The Court concluded:

". . . federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of . . . discrimination in hiring. Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act." 424 U.S. at 764-766.

3. During appellate proceedings subsequent to November 8, 1979, TWA did not rehire any class members. For that reason, no class members will return to work at TWA until long after it was originally contemplated. Based on TWA's recent estimate, the first retraining class will not commence before January 1983, more than three years after the entry of this Court's order which granted seniority. During all of that time, the incumbent flight attendants have continued to accrue competitive seniority, while the seniority of the class members has remained frozen by the fortuity of the appeals.

4. The mere passage of time in this case will have the effect of undermining the purpose and diminishing the value of the award of seniority granted by this Court. For example, if a class member who had been dismissed in July 1970 were to have been rehired in December 1979, that class member would now have a higher seniority status than all those stewardesses hired after 1970. On the other hand, if that same stewardess is actually rehired after January 1983, she may, depending on when she was originally hired, have to return to work with less seniority than currently active stewardesses who were hired between 1971 and 1973. Thus, the Order awarding seniority will not have the effect, as required by *Franks*, of "slotting the victim in that position in the seniority system that would have been [hers]" had there been no dismissal.

6. The clear intent of this Court's Order Awarding Seniority to grant "full restoration of retroactive seniority" to the class members will be thwarted unless the Order is modified to provide for the award of additional seniority up to the time when the class members are actually rehired by TWA.

WHEREFORE, the plaintiff class prays that this Court enter an order modifying its Order Awarding Seniority, to provide that in addition to the seniority previously awarded, each class member who has been or will be rehired by TWA pursuant to the Settlement Agreement shall be credited with full union (competitive) seniority from November 8, 1979 to the date of reemployment.

Respectfully submitted.

ARAM A. HARTUNIAN
Attorneys for the Plaintiffs

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MOTION TO ENFORCE CERTAIN TERMS OF THE SETTLEMENT AGREEMENT

[Filed October 6, 1982]

Now come plaintiffs, members of Subclasses A and B, by their counsel, and respectfully move this Court to compel TWA's compliance with the Settlement Agreement provisions regarding re-employment rights. A number of class members indicated their preference for trip passes rather than re-employment three years ago. Some of these persons now wish to be re-employed as flight attendants. TWA has recently taken the position that a "No" re-employment election made three years ago cannot be later changed. *See* letter of September 9, 1982, from William S. Borden, TWA's staff Vice President of In-Flight Services, to Laurence A. Carton, attached hereto as Exhibit A.

Background

A "Claim Form For Settlement Benefits" was completed by most class members in the summer of 1979, *over three years ago.* One of the questions asked on the claim form is "Do you desire re-employment as a TWA Hostess?" Next to the question are boxes labeled "Yes" and "No." The class members affected by this motion checked the "No" box. The Settlement Agreement itself provides, in pertinent part:

> TWA will reemploy as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such reemployment. Any class member who is not either ready, willing or qualified (as defined in Sections VI and IX) for reemployment shall receive from TWA the trip passes described in Section VII. (Section III B.)
>
> TWA will have no obligation to retrain or reemploy any class member following the end of such one (1) year period if such class member . . . has elected not to accept such reemployment during such one (1) year period. (Section VI.)

> A class member shall be eligible for reemployment if she . . . timely files the following described ReEmployment Application. . . .
>
> The Borden letter (Ex. A) states:
>
> Nine class members . . . previously indicated that they did not desire reemployment and now wish to change their election.*
>
> As time limits for original claim submittal are specific in the Settlement, TWA remains firm in its position that a "No" re-employment election cannot be later changed.

Discussion

The Settlement Agreement itself states that TWA will re-employ all class members who are "ready, willing and qualified." TWA is now taking the position that it will *not* re-employ certain class members who have indicated that they *are* "ready, willing and qualified" to accept the re-employment option. Both the Agreement itself and equitable principles demonstrate that TWA is wrong.

The Agreement itself nowhere states or implies that a class member's initial indication of her preference as to the re-employment or trip passes options will be binding and irrevocable. Nor does the claim form indicate the finality of such a choice. In fact, the Agreement itself states that re-employment will be offered to any class member who is "ready, willing and qualified." It also states that "a class member shall be eligible for re-employment if she . . . timely files the following described Re-Employment Application."

The "Re-Employment Application" referred to in the Agreement is the previously discussed Claim Form completed by class members three years ago. Each and every class

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* These 9 women are members of Subclass B. At least 1 member of Subclass A also desires to "change her election."

member has timely filed a "re-employment application"/Claim Form. Each class member has thereby established her right to the re-employment option. Furthermore, Section VI of the Agreement provides that TWA has "no obligation" to re-employ *if* a class member "has elected not to accept such re-employment during such one (1) year period." As this Court is well aware, the one year period did not commence running until April of this year. The class members in question are electing, *during* the one year period, to *accept* the re-employment option. TWA is thus obligated to re-employ these members. Nothing in the Agreement supports TWA's opinion that the option indicated three years ago is binding and irrevocable.

Equitable principles also require that these class members be given the re-employment option today even though they initially opted for the trip passes. Three full years have elapsed since the original claim forms were completed. The individual circumstances of all class members have changed. For example, a woman may have indicated "no" to re-employment due to the location of her residence, the age or health of her children, or her financial circumstances at that time. These are all circumstances which can change drastically during the course of three years. A preliminary indication regarding the desire to be re-employed should not preclude a class member's later determination that she wants to be re-employed under the circumstances presented here.

Furthermore, TWA has not hesitated to allow class members to make a similar change of decision regarding the trip pass option. Some class members who initially opted for re-employment have recently changed their minds and requested the trip passes. TWA has acceded to these requests. See Borden letter..Exhibit A.

For the foregoing reasons, plaintiffs ask that TWA be ordered to allow class members to opt for re-employment even though they initially indicated "no" to the re-employment option. TWA's present efforts to retrain all class members immediately make it imperative that this issue be resolved without delay.

Respectfully submitted,

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